

ORIGINAL



0000135223

RECEIVED

2012 MAR 16 A 9:48

Jim Staffnik EdD  
PO Box 546  
Concho Arizona  
85924

AZ CORP COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission  
Docket Control Center  
1200 West Washington Street  
Phoenix, Arizona 85007

Arizona Corporation Commission

DOCKETED

MAR 16 2012

DOCKETED BY

RE: WORKSHOP ON METER GUIDE LINES  
(DOCKET NO. E-00000C-11-0328)

Dear Commissioners and Staff,

The following are my comments regarding the proposed smart meter regulations. They are listed according to the proposed regulation.

### Draft Proposed Meter Guidelines

1. Measurement will not be specific to any particular appliance or electrical device, unless approved by the Commission for a specific tariff.

In its current form the regulation gives the Corporation Commission power to allow monitoring of specific appliance use. The Commission would not allow itself that power unless it intended to use that power in the future. The Commission should not allow itself that power.

Collection of data without consumer consent is most likely a violation of the Fourth Amendment (see attached Case No. 11-cv-9299 Naperville Smart Meter Awareness v. City of Naperville "the subject smart meter installations constitute an impermissible invasion of privacy in violation of the Fourth Amendment of the United States Constitution.")

The regulation also attaches specific appliance use to a "specific tariff," implying that the Commission could in the future place itself in the position of lifestyle regulator if for example the Commission decided it wanted to place a specific tariff on air conditioner use.

Smart meters should not be installed without consumer consent. If the consumer consents to smart meter installation, this regulation should read simply "Measurement will not be specific to any particular appliance or electrical device."

2. The utility will not share energy usage data except with its authorized agent. Individual or aggregate usage data will never be sold.

Collection of data without written consent and requiring customers to attach a transmitting device to collect private data most likely is a violation of the Fifth Amendment of the US Constitution (see attached Case No. 11-cv-9299) because along with other reasons, it "imposes a permanent physical occupation of the residence without consent and without just compensation."

"Authorized agent" is not defined and leaves information sharing up to the discretion of the utility with no consumer input. The regulation as written leaves open privacy issues and does not require utilities to notify consumers, allow consumers to keep their usage data private, or to ensure the privacy of the information. The existence of this proposed regulation assumes that consumers own their information, at least in part. The regulation as written does not acknowledge consumer ownership of their information. There is virtually no consideration of consumer data safety or consumer rights to control of their information in the regulation as written

Installation of smart meters should be prohibited without the consent of the homeowner or consumer whose data would be collected. If a consumer consents to smart meter installation, the regulation should read:

The utility will not share energy use data except with the express written consent of the consumer. The written consent request must be provided to the consumer for approval each time information is to be shared. Usage data will not be shared without the written consent of the consumer. The written consent request must include the individual(s) and agency(s) to which the information is to be shared, the specific purpose for which the information is being shared, and the time period during which usage information will be compiled and shared. The date at which the information sharing will stop will be specified in the notice. The utility will specify to the consumer, at the time permission to share usage information is requested, the procedures by which the utility will safeguard the privacy of consumer information and will outline the procedures consumers can take to obtain compensation for the misuse, mishandling, or leaking of the information. No usage data of any kind will be sold at any time.

3. All information transmitted between meters and the utility must be encrypted and password protected using US government approved and recommended standards.

Smart meters should not be installed without written consent of the consumer. If the consumer consents to installation the following needs to be considered: The presence of this regulation assumes that transmitted data can be intercepted thereby causing harm to consumers. Consumers need an avenue to seek damages from the utility when information is intercepted or hacked. Utilities want to use this type of data transmission, they should not only be responsible for putting security measures in place, they should also be responsible for damages caused because

of their chosen method of transmission when the prior methods of data collection were more secure. They create the risk, they should pay for harm. (see attached Case No. 11-cv-9299).

4. Data from each meter must use specific unique identifiers associated with the customer's meter number and service address to ensure that each customer is billed only for his / her own usage.

Smart meters should not be installed without consent of the consumer. If the consumer consents to installation the following needs to be considered. Billing errors can cause nightmares for consumers. This regulation assumes errors will occur if measures are not in place. However, the measures do not guarantee the absence of errors. Utilities need to be responsible for troubles caused by billing errors (e.g., power shut off for non-payment, lost food, etc.) and consumers should be awarded attorney's fees if applicable.

5. The utility will not control or shut off individual appliances without customer consent based on an approved ACC tariff.

This allows regulation of lifestyle via control of appliance use. Smart meters should not be installed without written consumer consent. If the consumer consents, this regulation should read simply "The utility will not control or shut off individual appliances."

6. The utility may shut off electric service per ACC rules. The utility will abide by current regulations with respect to shut-off of service and curtailment in power emergencies.

I do not know what the ACC rules for shut off are. I also know that "current regulations" can change given the composition of the ACC. I also do not know what constitutes a power emergency or who determines that an emergency exists. Smart meters should not be installed without written consumer consent. However, if the consumer consents to smart meter installation, the regulation should include language such as that included in Michigan HB 5411 (attached)

**PROHIBIT AN ELECTRIC UTILITY FROM SHUTTING OFF SERVICE TO  
10 A CUSTOMER BASED ON ANY OF THE FOLLOWING REASONS:**

**11 (i) THE AMOUNT OF ELECTRICITY THE CUSTOMER USES.**

**12 (ii) THE CUSTOMER DECLINING THE INSTALLATION OR USE OF AN  
13 ADVANCED METER.**

7. The utility will limit the length of data transmission over a 24 hour period, (utility input will help define the appropriate length of time in seconds or minutes per time period).

I do not know the intent of this proposed regulation and therefore do not know if it would meet its intended purpose. However, there is no need to collect usage information more than once per month. Smart meters should not be installed without consumer specific written consent. If the consumer provides written consent, meters should be used for billing purposes only. Language should

**PROHIBIT AN ELECTRIC UTILITY FROM OBTAINING DATA FROM AN  
18 ADVANCED METER MORE THAN ONCE PER MONTH, UNLESS REQUESTED BY A  
19 CUSTOMER.**

See attached Michigan HB 5411

8. Individual usage data gathered will be available only to the customer, the utility, and its duly authorized agent. Such data may be used only to help the customer make choices that will help keep electric bills to a minimum.

Again "duly authorized agent" is ill defined and essentially leaves availability of data open to the discretion of the utility for whatever purposes the utility deems appropriate without consumer input. "Authorized agent" could be a sales person who is trying to "help the consumer make choices" about appliances etc.

The regulation should read "Individual usage data gathered will be available only to the customer and the utility." Release of data to "authorized agents" should only occur after the consumer has provided written consent under the conditions enumerated under #2 above.

9. The utility will use only aggregate, anonymous data for system planning purposes

No comment.

Additional Information/Comments:

During a personal face to face conversation with Dave Plumb CEO of Navopache Electric after the last annual meeting, Mr. Plumb told me directly that Navopache did not need my permission to install a smart meter because of the maintenance contract I signed when adding my wife to the billing information in December 2004. None of the Board members present disagreed with Mr. Plumb. At the time I signed the maintenance agreement, I was under the dostomct impression that I was required to sign the contract or Navopache would not provide service. I had no option but to sign and I was not provided with any alternative. During our conversation Mr. Plumb essentially said that because of that maintenance contract, Navopache could do what they

deemed necessary on my property without informing me and without my input whenever he or the Board thought it necessary. After our conversation Mr. Plumb sent me a copy of the contract with the relevant portion highlighted and his business card attached. Mr. Plumb's attitude in my opinion is reprehensible given his position of public trust in a "cooperative," and needs to be taken as an example of potential misuse of "authority" with regard to smart meter installation and use.

An "OPT OUT" policy/regulation is completely missing and is a crucial element of regulation. An opt out provision should be mandatory.

In addition to requiring the utility to obtain written permission for installation of a smart meter, the opt out policy should include provisions that specifically address opt out issues such as the following taken from Michigan's HB 5411 (see attached)

**PROHIBIT AN ELECTRIC UTILITY FROM IMPOSING ANY DISINCENTIVE ON A CUSTOMER FOR NOT ACCEPTING THE INSTALLATION OR USE OF AN ADVANCED METER.**

**REQUIRE AN ELECTRIC UTILITY, 30 DAYS BEFORE INSTALLING AN ADVANCED METER, TO SEND A NOTICE TO THAT CUSTOMER INFORMING THE CUSTOMER OF THE RIGHT TO DECLINE THE INSTALLATION OR USE OF AN ADVANCED METER.**

**THE COMMISSION 1 SHALL DO ALL OF THE FOLLOWING:**

**REQUIRE AN ELECTRIC UTILITY TO ALLOW A CUSTOMER TO DECLINE THE INSTALLATION OR USE OF AN ADVANCED METER.**

**REQUIRE AN ELECTRIC UTILITY, AT A CUSTOMER'S REQUEST, (AND AT UTILITY'S EXPENSE my comment) TO UNINSTALL ANY ADVANCED METER.**

**(2) AS USED IN THIS SECTION, 1 "ADVANCED METER" MEANS A METER  
2 THAT IS CAPABLE OF MEASURING, RECORDING, STORING, AND REPORTING  
3 USAGE ACCORDING TO PREDETERMINED TIME CRITERIA AND THAT ALLOWS 2-  
4 WAY COMMUNICATIONS SUITED FOR DEMAND-RESPONSE PROGRAMS.**

Respectfully,

Jim Staffnik  
Concho Arizona

# HOUSE BILL No. 5411

February 16, 2012, Introduced by Reps. McMillin, Opsommer, Forlini, Franz, Moss, Lund, Heise, Hooker and Lyons and referred to the Committee on Energy and Technology.

A bill to amend 1939 PA 3, entitled

"An act to provide for the regulation and control of public and certain private utilities and other services affected with a public interest within this state; to provide for alternative energy suppliers; to provide for licensing; to include municipally owned utilities and other providers of energy under certain provisions of this act; to create a public service commission and to prescribe and define its powers and duties; to abolish the Michigan public utilities commission and to confer the powers and duties vested by law on the public service commission; to provide for the continuance, transfer, and completion of certain matters and proceedings; to abolish automatic adjustment clauses; to prohibit certain rate increases without notice and hearing; to qualify residential energy conservation programs permitted under state law for certain federal exemption; to create a fund; to provide for a restructuring of the manner in which energy is provided in this state; to encourage the utilization of resource recovery facilities; to prohibit certain acts and practices of providers of energy; to allow for the securitization of stranded costs; to reduce rates; to provide for appeals; to provide appropriations; to declare the effect and purpose of this act; to prescribe remedies and penalties; and to repeal acts and parts of acts,"

(MCL 460.1 to 460.11) by adding section 10ff.

## THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 SEC. 10FF. (1) THE COMMISSION SHALL DO ALL OF THE FOLLOWING:

2 (A) REQUIRE AN ELECTRIC UTILITY TO ALLOW A CUSTOMER TO DECLINE  
3 THE INSTALLATION OR USE OF AN ADVANCED METER.

4 (B) REQUIRE AN ELECTRIC UTILITY, AT A CUSTOMER'S REQUEST, TO  
5 UNINSTALL ANY ADVANCED METER.

6 (C) REQUIRE THAT AN ELECTRIC UTILITY DOES NOT GIVE ANY METER  
7 USE DATA FROM AN ADVANCED METER TO ANY PERSON OTHER THAN THE  
8 ELECTRIC UTILITY.

9 (D) PROHIBIT AN ELECTRIC UTILITY FROM SHUTTING OFF SERVICE TO  
10 A CUSTOMER BASED ON ANY OF THE FOLLOWING REASONS:

11 (i) THE AMOUNT OF ELECTRICITY THE CUSTOMER USES.

12 (ii) THE CUSTOMER DECLINING THE INSTALLATION OR USE OF AN  
13 ADVANCED METER.

14 (E) PROHIBIT AN ELECTRIC UTILITY FROM IMPOSING ANY  
15 DISINCENTIVE ON A CUSTOMER FOR NOT ACCEPTING THE INSTALLATION OR  
16 USE OF AN ADVANCED METER.

17 (F) PROHIBIT AN ELECTRIC UTILITY FROM OBTAINING DATA FROM AN  
18 ADVANCED METER MORE THAN ONCE PER MONTH, UNLESS REQUESTED BY A  
19 CUSTOMER.

20 (G) REQUIRE AN ELECTRIC UTILITY, 30 DAYS BEFORE INSTALLING AN  
21 ADVANCED METER, TO SEND A NOTICE TO THAT CUSTOMER INFORMING THE  
22 CUSTOMER OF THE RIGHT TO DECLINE THE INSTALLATION OR USE OF AN  
23 ADVANCED METER.

24 (H) ISSUE A REPORT EACH YEAR TO THE HOUSE AND SENATE STANDING  
25 COMMITTEES WITH OVERSIGHT OF PUBLIC UTILITIES ISSUES OUTLINING  
26 ELECTRIC UTILITIES' COMPLIANCE WITH THIS SECTION.

1           (2) AS USED IN THIS SECTION, "ADVANCED METER" MEANS A METER  
2    THAT IS CAPABLE OF MEASURING, RECORDING, STORING, AND REPORTING  
3    USAGE ACCORDING TO PREDETERMINED TIME CRITERIA AND THAT ALLOWS 2-  
4    WAY COMMUNICATIONS SUITED FOR DEMAND-RESPONSE PROGRAMS.



**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

NAPERVILLE SMART METER AWARENESS,  
an Illinois not-for-profit corporation,

Plaintiff,

v.

CITY OF NAPERVILLE,

Defendant.

Case No. 11-cv-9299

**COMPLAINT FOR INJUNCTIVE RELIEF**

The Plaintiff, NAPERVILLE SMART METER AWARENESS ("NSMA" or "Plaintiff"), by its attorney of record, files this Complaint against the CITY OF NAPERVILLE (the "City" or "Defendant").

**I. NATURE OF THE ACTION**

1. The Defendant is rushing forward with the installation of so-called "smart" meter devices throughout the municipality of Naperville, Illinois despite a multitude of serious health, safety, security, and privacy concerns – some of which involve apparent constitutional and statutory violations.

2. The Plaintiff seeks a judgment requiring the Defendant to cease all smart meter installations until reasonable safeguards are in place and until satisfactory alternative options for all customers are made available.

3. The requested injunctive relief is urgently needed to prevent potentially irreparable injury to Plaintiff and thousands of individuals residing in Naperville, and Plaintiff has brought this action accordingly.

## **II. JURISDICTION AND VENUE**

4. This action raises federal questions under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, as well as issues under federal statute.

5. This Court has subject matter jurisdiction over these federal claims pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367.

6. This Court has personal jurisdiction over all of the parties hereto because they are all residents of Illinois and conduct their activities in Illinois.

7. Venue is proper under 28 U.S.C. § 1391 in the Northern District of Illinois because a substantial part of the events or omissions giving rise to the subject claims arose in this district.

## **III. PARTIES**

8. Plaintiff, Naperville Smart Meter Awareness, an Illinois not-for-profit corporation organized under Section 501(c)(6) of the Internal Revenue Code, was formed to educate, engage and empower families, friends and neighbors to advocate for a fiscally responsible and safe utility meter solution in Naperville, Illinois. All officers and board members of NSMA reside in Naperville, are customers of Defendant's electric utility service, and as such will soon suffer the forced installation of a smart meter at their residence absent the requested injunctive relief. Substantially all of the NSMA's volunteer membership has similar standing as residents of Naperville and customers of

Defendant's electric utility service, and are thereby threatened in the identical way with the same substantial harm.

9. Defendant, City of Naperville (the "City"), operates under the council-manager form of government consisting of the Mayor and eight Councilmen elected as provided by State law. The Naperville City Council ("City Council") is the governing body of the City and has the powers and duties prescribed by statute and by ordinance of the City of Naperville.

#### **IV. FACTUAL BACKGROUND**

10. The City, located in the counties of DuPage and Will in the State of Illinois, is home to approximately 145,000 residents. The City is a "home rule" unit of local government pursuant to Article VII of the Illinois Constitution of 1970.

11. Electricity for all residential and commercial consumers within the incorporated city limits of Naperville, Illinois is supplied by the City's Department of Public Utilities-Electric ("DPU-E"), a utility entirely owned and operated by the City. DPU-E is a municipal, citizen-owned utility, is not investor owned, and as such is outside the regulatory oversight of the Illinois Commerce Commission.

12. The Public Utilities Advisory Board ("PUAB") serves in an advisory capacity to the City Council, City Manager and the Public Utilities Director in matters relating to rates, budgets and capital improvements for electric, water and wastewater systems. The PUAB's members include one Council member, and five residents or persons with their primary employment in Naperville. Members serve three-year terms.

#### **A. Naperville Smart Grid Initiative**

13. The American Recovery and Reinvestment Act of 2009 signed by Barack Obama in February 2009 provided the U.S. Department of Energy (the "DOE") with approximately \$4.5 billion of federal tax dollars to modernize the electric power grid. Of this funding, \$3.4 billion went into the Smart Grid Investment Grant Program ("SGIG") for the purpose of funding competitively selected projects across the country. One of the projects selected by the DOE for its SGIG is the City's Naperville Smart Grid Initiative ("NSGI").

14. On April 20, 2010, the City Council passed Resolution No. 10-021 authorizing the execution of a grant agreement with the DOE.

15. On April 21, 2011, the City executed the grant agreement with the DOE whereby the City and the DOE each provide \$10,994,110 towards the \$22 million investment in NSGI (the "DOE Agreement") (Exhibit A).

16. Under the DOE Agreement, the NSGI start date was April 21, 2011. The DOE Agreement further specifies a "Period of Performance" of sixty (60) months, and NSGI implementation shall conclude within thirty-six (36) months from the NSGI start date, subject to the right of the City to unilaterally extend the award one time for up to one year.

17. NSGI's Statement of Project Objective described in Attachment E of the DOE Agreement states, in pertinent part: "An additional goal is to collect information from customers, distributors, and generators to understand how smart grid technologies may lead to reductions in demands and costs..."

## **B. Smart Meters**

18. The City has announced plans to proceed with full replacement of all of its customers' existing analog electricity meters with so-called "smart" meters beginning on January 4, 2012.

19. The City has already installed a small number of smart meters within the municipality as part of a pilot test program. To the best of Plaintiff's knowledge, tests results are inconclusive and may not be complete.

20. The full-scale installation period necessary for all 57,000-plus of the new smart meters within the municipality is currently estimated by the City to be ten months.

21. The smart meters incorporated in the NSGI are a wireless-ready device which in the typical application functions as a radio transmitter, utilizing a wireless radio frequency ("RF") network to communicate power usage data from the customer's home or business back to the utility on a regular, if not constant, basis.

22. Smart meters and related systems will allow the City, through its DPU-E, to conduct automated and remote meter reading, collect detailed measurements about customer usage within their premises, collect and store data about such usage, and communicate data to and from customer meters.

23. Federal support for the development of smart meter systems began with the Energy Policy Act of 2005, was supplemented with passage of the Energy Independence and Security Act of 2007, and heavily funded by the American Recovery and Reinvestment Act of 2009, which set aside \$11 billion for the creation of a smart grid on a national basis.

24. None of this federal legislation in any way mandates utility customer participation in a smart meter program or a smart grid. The Energy Policy Act of 2005 very clearly establishes an optional standard by which utilities are required to make “time-based” meters available “upon customer request.”<sup>1</sup>

25. NSGI is comprised of a system that utilizes a “mesh” network which requires linkage and communication via RF waves between individual customer meters and wireless repeaters (generally located on utility poles). Via this interlocking mesh of wireless technology, meters and other sensing devices are utilized to relay or “hop” usage data from point to point until it reaches its final destination, the utility. NSGI’s wireless system is designed to support two-way communication between an individual customer’s meter and the utility company. Individual smart meters can be upgraded remotely by the utility, providing the ability to implement future innovations and add-ons easily.

26. A smart meter installed by the City is thereby used as a communication device in furtherance of the City’s overall NSGI system for purposes which go beyond the delivery of electricity to the residence to which the meter is attached.

---

<sup>1</sup> “Not later than 18 months after August 8, 2005, each electric utility shall offer each of its customer classes, and provide individual customers *upon customer request*, a time-based rate schedule under which the rate charged by the electric utility varies during different time periods and reflects the variance, if any, in the utility’s costs of generating and purchasing electricity at the wholesale level. The time-based rate schedule shall enable the electric consumer to manage energy use and cost through advanced metering and communications technology . . . . Each electric utility subject to subparagraph (A) shall provide *each customer requesting* a time-based rate with a time-based meter capable of enabling the utility and customer to offer and receive such rate, respectively. 16 U.S.C. §2621(d)(14)(A) and (C)(emphases added).

### C. Health, Safety, Privacy, and Security Concerns Surround Smart Meters

27. In January of 2011, during an interview with *The New York Times*, California State Representative Jared Huffman stated, in pertinent part: *"Whether or not you believe RF [radio frequency] exposures from smart meters are harmful, it's only fair that consumers who are concerned about health effects be given complete technical information and the choice of another technology for devices that are installed at their homes."*<sup>2</sup>

28. The California Council on Science and Technology ("CCST") stated in their report released in April, 2011, *"that no additional standards are needed to protect the public from smart meters."* However, CCST also stated: *"Not enough is currently known about potential non-thermal impacts of radio frequency emissions to identify or recommend additional standards for such impacts. ... It is not scientifically confirmed whether or what the non-thermal effects on living organisms, and potentially, human health might be."*<sup>3</sup>

29. Funding and deployment during what some have called the "smart grid gold rush" has vastly outstripped the federal government's ability to develop meaningful privacy and security standards and regulations within one of the nation's most critical infrastructures.<sup>4</sup>

---

<sup>2</sup> *Health Concerns Over 'Smart' Electric Meters Gain Traction in California*, The New York Times (January 10, 2011): <http://www.nytimes.com/gwire/2011/01/10/10greenwire-health-concerns-over-smart-electric-meters-gai-81496.html>

<sup>3</sup> See *Health Impacts of Radio Frequency from Smart Meters*, California Council on Science and Technology (Final Report – Release April, 2011): <http://www.ccst.us/publications/2011/2011smart-final.pdf>

30. On January 12, 2011, the U.S. Government Accountability Office reported that smart grid technologies such as the wireless smart meters that are deployed at homes and businesses were being developed and deployed without adequate attention to security features including thorough event logging and other forensic features.<sup>5</sup>

31. Reports of cyber attacks and security breaches are regularly in the news.<sup>6</sup>

32. The City has denied Plaintiff's requests made under the Freedom of Information Act for a copy of its cyber security plan (even a redacted version) due to "sensitive and confidential information."

33. On March 2, 2011, the City released a two-page summary of its cyber security plan that offers no insight into, or confidence about, the identity and qualifications of those responsible for crafting the cyber security plan.<sup>7</sup>

34. Plaintiff continues to be denied the right to even the most basic information about the City's cyber security plan, including specific policies and

---

<sup>4</sup> *Smart Grid Privacy and Security Risks Loom For Agencies*, AOLEnergy.com (August 5, 2011): <http://energy.aol.com/2011/08/05/smart-grid-privacy-and-security-risks-loom-for-agencies/>

<sup>5</sup> See *Progress Being Made on Cybersecurity Guidelines, but Key Challenges Remain to be Addressed*, GAO-11-117, Jan 12, 2011: <http://www.gao.gov/products/GAO-11-117>

<sup>6</sup> See e.g., *24,000 Pentagon files stolen in major cyber breach, official says*, The Washington Post (July 14, 2011): [http://www.washingtonpost.com/blogs/checkpoint-washington/post/24000-pentagon-files-stolen-in-major-cyber-breach-official-says/2011/07/14/gIQAsaaVEI\\_blog.html?tid=sm\\_twitter\\_washingtonpost](http://www.washingtonpost.com/blogs/checkpoint-washington/post/24000-pentagon-files-stolen-in-major-cyber-breach-official-says/2011/07/14/gIQAsaaVEI_blog.html?tid=sm_twitter_washingtonpost); *US energy grid vulnerable to cyber attacks*, MSNBC (September 1, 2011): [http://www.msnbc.msn.com/id/44358679/ns/technology\\_and\\_science-security/t/us-energy-grid-vulnerable-cyber-attacks/#.TmGlbY7H9i1](http://www.msnbc.msn.com/id/44358679/ns/technology_and_science-security/t/us-energy-grid-vulnerable-cyber-attacks/#.TmGlbY7H9i1)

<sup>7</sup> See *Security Handbook Summary, Version 6.0* (March 2, 2011): [http://www.naperville.il.us/emplibary/Smart\\_Grid/NSGI-SecurityHandbook.pdf](http://www.naperville.il.us/emplibary/Smart_Grid/NSGI-SecurityHandbook.pdf)



procedures that have been put into place to ensure Naperville residents will be notified in case of a security breach or cyber attack.

35. On February 15, 2011, the City adopted the Naperville Smart Grid Customer Bill of Rights ("Bill of Rights").<sup>8</sup> However, the Bill of Rights contains no enforcement mechanism or meaningful legal remedies, thus providing little assurance to customers that their personal information is fully secure.

36. The Bill of Rights acknowledges the right to petition the PUAB if a privacy violation occurs. However, the City has not granted such authority to the PUAB and will not have done so before January 4, 2012, when the full scale installation of smart meters is set to begin. It also remains uncertain what if any legal recourse or remedies a customer would have available to her or him as part of any PUAB complaint or petition action.

#### **D. Naperville Smart Grid Initiative Steering Committee**

37. According to the City, the Naperville Smart Grid Initiative Steering Committee ("NSGI Steering Committee") is chaired by a member of West Monroe Partners, LLC, a Chicago-based management/consulting firm ("West Monroe") contracted by the City to manage and oversee the implementation, deployment and quality assurance of the NSGI – including smart meter installation.

38. Other members of the NSGI Steering Committee include additional individuals in the employ of West Monroe, at least one employee of a public relations

---

<sup>8</sup> See *Naperville Smart Grid Bill of Rights*, Ordinance 11-029, Section 8-1B-2(c) (Passed February 15, 2011): [http://www.naperville.il.us/emplibrary/Smart\\_Grid/NSGI-CBoR-web.pdf](http://www.naperville.il.us/emplibrary/Smart_Grid/NSGI-CBoR-web.pdf)

firm contracted by the City, City staff persons, and up to two members of the City Council.

39. According to Plaintiff's good faith analysis, to date the City has entered into four contracts totaling approximately \$5.1 million with West Monroe.

40. As described in ¶ 43 herein, a portion of the subject \$5.1 million in taxpayer and/or ratepayer dollars was used to insert undisclosed "shills" into public meetings of a government body for the admitted purpose of supporting a project that benefits the government body's contractor.

41. On knowledge and belief, the NSGI Steering Committee is entirely funded by the City.

42. According to the City's website, the NSGI Steering Committee currently meets every Thursday before the second City Council meeting of the month at the Electric Service Center, 1392 Aurora Avenue, Naperville, Illinois, at 9 a.m.

43. On March 29, 2011, David Tilson, an employee of West Monroe, sent an email to Brian Quirke, employee of the DOE, which stated in pertinent part: *"We have been receiving questions from residents regarding the safety and security of the Smart Meters that we will be deploying. . . . We have the full support of the City Council but they may be forced to make some decisions for political reasons (providing a "communications option", etc). . . . {T}here is a City Council meeting where this group [Naperville Smart Meter Awareness] has been airing their grievances during an open forum and we've been working to insert speakers into that forum that support the program."* [Emphasis added.]

44. On March 30, 2011, David Tilson of West Monroe sent an email to Brian Quirke of the DOE which stated in pertinent part: *"Brian... thanks for your call today. Here is the link to the residents website who are speaking out about the health and safety concerns for smart meters. <http://www.napervillesmartmeterawareness.org/latest-news/>."*

45. During the City Council meeting on April 19, 2011, Councilman Douglas Krause expressed concerns regarding notices, as well as dates and times, of NSGI Steering Committee meetings not being properly given. Councilman Krause provided at least one example of a meeting date being changed with no notice provided.

46. Councilman Krause expressed further concerns regarding a report he had heard to the effect that video and/or transcripts highlighting citizens speaking in opposition to smart meters during the public comment portion of City Council meetings are being sent to the DOE. City Manager Doug Kreiger responded in substantial part, "they will not be individually sent to the Department of Energy," adding that the City "will not be mailing comments off to the Department of Energy," but added a caveat to the effect that it would only happen if requested and allowed by the terms of the DOE Agreement.<sup>9</sup>

#### **E. Pending Investigation by the Attorney General of Illinois**

47. In September 2011, two separate Requests for Review of alleged violations of the Illinois Open Meetings Act (5 ILCS 120/3.5)(the "OMA") were filed by a member of NSMA's Board with the Office of the Illinois Attorney General in regard to the NSGI Steering Committee.

---

<sup>9</sup> See Naperville City Council meeting of April 19, 2011 (at approximately the 45 minute mark): [http://naperville.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=333](http://naperville.granicus.com/MediaPlayer.php?view_id=2&clip_id=333)

48. Two letters from the Office of the Attorney General to the City (October 6, 2011 and November 10, 2011) advised that further inquiry was warranted into the alleged OMA violations. The City continues to maintain that the NSGI Steering Committee "is not a public body within the meaning of the Open Meetings Act."

49. As of the date of this Complaint, Plaintiffs have no knowledge regarding the status of the above referenced inquiry by the Office of Attorney General into this matter.

#### **F. Advisory Referendum Pending on Smart Meters**

50. On November 15, 2011, 4,209 petition signatures were filed with the Naperville City Clerk's office seeking to place the following Advisory Referendum question on the March 20, 2012, General Primary Election ballot within the municipality of Naperville, Illinois (the "Advisory Referendum"):

"Shall the City of Naperville immediately and permanently stop the implementation of the \$22 million smart meter project and dismantle all related equipment?"

51. An objection to the subject petition filing was filed on December 27, 2011. The objection is pending before the City's Election Commission as of the date of this Complaint.

52. In response to a Freedom of Information Act request, the City advised that Councilman Robert Feiseler was the only individual to request a copy of the subject Advisory Referendum petition papers as filed with the City.

53. The City's Election Commission is comprised of City Mayor George Pradel, City Clerk Pam LaFeber, and Councilman Douglas Krause.

54. NSMA, including its officers, board, and volunteers, proudly took an active leadership role in the subject petition drive.

**G. Non-Wireless Meter Alternative**

55. On October 4, 2011, the City Council adopted Ordinance 11-144 amending Title 8, Chapter 1, Article A and Article C of the Naperville Municipal Code to allow for a Non-Wireless Meter Alternative ("NWMA") option.

56. Any Naperville resident requesting the NWMA option will be subject to a one-time charge of \$68.35 and an addition monthly charge not specified in Ordinance 11-144.

57. The City is scheduled to begin installation of smart meters on January 4, 2012, and in doing so deprives Naperville residents of the opportunity to reasonably vet their options and alternatives in advance.

58. The City is not providing customers with the option of keeping their current analog meter.

59. On October 18, 2011, the City stated it has not budgeted for a mailing to apprise Naperville residents of the NWMA option.<sup>10</sup>

60. NSGI's home page on the City's website provides no information for Naperville residents regarding the NWMA option.

---

<sup>10</sup> See e.g., Naperville City Council meeting of October 18, 2011 (at approximately the 32 minute mark), where City Manager Doug Krieger responds to a NSMA member's question about the City's plan to notify Naperville residents regarding the NWMA, with "Are we going to be doing a mass mail out to 50,000 people? We are not. Part of the reason is that I think the NSMA group is doing a great job of getting the word out. But you know that if you assume even just a \$1 a letter, we haven't budgeted \$50,000 anywhere to do a mailing to all of our customers."

61. The City's NSGI Utility Bill Insert of December 2011 did not include a notice to Naperville residents of the NWMA option.<sup>11</sup>

## V. CLAIMS AGAINST DEFENDANT

### COUNT I.

#### Violation of the Energy Policy Act of 2005 (16 U.S.C. § 2621(d)(14)(A) and (C))

62. Plaintiff reasserts and incorporates by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

63. The Defendant is an "electric utility" under 16 U.S.C. § 2602(4).

64. By forcing its customers to accept smart meters, the City has not provided the freedom and choice mandated by the Energy Policy Act of 2005, and is therefore in violation of 16 U.S.C. § 2621(d)(14)(A) which states:

Not later than 18 months after August 8, 2005, each electric utility shall offer each of its customer classes, and provide individual customers *upon customer request*, a time-based rate schedule under which the rate charged by the electric utility varies during different time periods and reflects the variance, if any, in the utility's costs of generating and purchasing electricity at the wholesale level. The time-based rate schedule shall enable the electric consumer to manage energy use and cost through advanced metering and communications technology. [Emphasis added.]

A further mandate is set forth in § 2621(d)(14)(C) which states:

Each electric utility subject to subparagraph (A) shall provide *each customer requesting* a time-based rate with a time-based meter capable of enabling the utility and customer to offer and receive such rate, respectively. [Emphasis added.]

65. As a direct result of the City's failure to provide the freedom of choice clearly required by federal statute, the forced installation of smart meters by the City will cause the Plaintiff to suffer substantial and irreparable injuries.

---

<sup>11</sup> See e.g., NSGI Utility Bill Insert – December 2011:  
[http://www.naperville.il.us/emplibrary/Smart\\_Grid/NSGI-UBI-2011-12.pd](http://www.naperville.il.us/emplibrary/Smart_Grid/NSGI-UBI-2011-12.pd)

**COUNT II.**  
**Violation of the Fourteenth Amendment - Right to Due Process**

66. Plaintiff reasserts and incorporate by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

67. Multiple meetings conducted by the NSGI Steering Committee during the planning and approval phases regarding smart meter installation are alleged to have violated the OMA. The Illinois Attorney General is currently conducting an inquiry into those allegations.

68. On knowledge and belief, such inquiry is ongoing as of the date of this Complaint.

69. The OMA is designed to prohibit secret deliberations and action on matters which, due to their potential impact on the public, properly should be discussed in a public forum.

70. The NSGI Steering Committee has had a major role in the development and implementation of the entire smart meter installation program.

71. Plaintiff has a significant and valuable interest in the health and privacy, not only with respect to its own members, but also with regard to their families' welfare and safety.

72. The NSGI Steering Committee met repeatedly, without proper notice, to plan and implement a significant program on behalf of the City which now threatens the health, safety, privacy, and security of Plaintiff's members and thousands of other Naperville residents.

73. Defendant, acting under color of state law, and by policy and practice, knew or should have known that it was depriving Plaintiff of a clearly established right to due process of law as secured by the Fourteenth Amendment to the United States Constitution.

74. Because of Defendant's actions and omissions, Plaintiff has suffered, and will continue to suffer injury and irreparable harm.

**COUNT III.**  
**Violation of the Fourth Amendment**

75. Plaintiff reasserts and incorporate by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

76. Unlike a traditional analog meter which provides no historical data about energy usage, smart meters can be accessed remotely and contain an uncertain amount of data about occupant behavior. This information could facilitate threats to a customer's physical security and property interests - for example by providing detailed information regarding when an individual is home.

77. Smart meter technology creates a new system of data collection, communication, and information sharing related to energy usage. The potential exists to collect, store and share private customer information without customer consent or control. The new technology allows utilities to obtain a highly detailed picture of activities within a home.

78. Before smart meters came on the scene, the only information utilities collected from customers was the total consumption of electricity on a monthly or less



frequent basis, and only in terms of kilowatt hours consumed. In contrast, smart meters can allow tracking of time patterns associated with occupants of a dwelling unit.

79. Smart meters provide rich knowledge about intimate details of a customer's life and serious concerns exist regarding access to personal data gleaned from the devices. Access may also be obtained by accidental breach or cyber attack.

80. As the City's electric customers have no true choice in whether or not to provide new additional data to the City, and further have not provided their consent, the subject smart meter installations constitute an impermissible invasion of privacy in violation of the Fourth Amendment of the United States Constitution.

81. Because of Defendant's actions and omissions, Plaintiff has suffered, and will continue to suffer, injury and irreparable harm.

**COUNT IV.**  
**Violation of the Fifth Amendment**

82. Plaintiff reasserts and incorporate by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

83. The City is moving forward with a plan whereby customers will suffer a permanent occupation of their homes by the City's radio frequency equipment.

84. The City is responsible for delivering electricity to its customers. That duty however is sufficiently performed by standard analog or non-smart meters.

85. Smart meters have additional equipment designed to serve the City's purpose of collecting substantially more detailed private data from a customer's home and other customers in the neighborhood, and then transmitting this private data to the City.

86. With consent of the customer there would be no taking, but in the instant case consent has not been sought by the City.

87. On knowledge and belief, many Naperville residents have absolutely no idea that a new wireless device will soon be attached on or near their homes.

88. Requiring customers to allow the City to attach RF transmitting equipment to the home to collect private data the customer does not want to share, and to facilitate the City's collection of data from other homes, imposes a permanent physical occupation of the residence without consent and without just compensation.

89. Allowing a customer to "opt-out" by paying an unreasonable penalty does not cure the constitutional violation. This is especially true with the City's plan where there is currently no option to keep an analog meter.

90. The City is not offering a true "opt-out" alternative. A customer must accept a smart meter. The only option is to have the radio transmitter "shut off." Such meters will still collect the same detailed information, but it will be stored on a computer memory card instead of being transmitted wirelessly throughout the day. Finally, for persons residing in a condominium or apartment complex, there is in the typical case no alternative option whatsoever.

91. The City's smart meter installation as currently proposed is unconstitutional because the City's electric customers are required to allow the City to attach equipment to the customers' homes for the City's own purposes, without consent and without compensation in violation of the takings clause in the Fifth Amendment of the United States Constitution and Article I of the Illinois Constitution of 1970.

92. Because of Defendant's actions and omissions, Plaintiff has suffered, and will continue to suffer injury and substantial harm.

#### **VI. PRAYER FOR RELIEF**

The Plaintiff respectfully requests that the Court:

1. Enter a preliminary and permanent injunction requiring the City to cease and suspend the installation of smart meters within the municipality of Naperville, Illinois until such time as:

a. the voters of the municipality are allowed to have their voices heard on this matter of significant public concern through an advisory referendum;

b. the City recognizes the right of residents to keep and continue to utilize analog meters at no additional expense; and

c. the City passes an ordinance specifying that smart meter installation shall be implemented on an "opt-in" basis.

2. Grant the Plaintiff such other relief as the Court determines just and proper.

Dated this 30th day of December, 2011.

Respectfully submitted,

By: s/Doug E. Ibendahl

Doug E. Ibendahl, ARDC No.: 6229474  
165 N. Canal Street, Suite 1215  
Chicago, Illinois 60606-1404  
Tel: 312-648-0061  
Email: dibendahl@mail.com  
ATTORNEY FOR PLAINTIFF

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of December, 2011, a true and correct copy of the foregoing **COMPLAINT FOR INJUNCTIVE RELIEF** was filed by ECF with the U.S.

District Court of the Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois and served upon the following by in-hand delivery:

City of Naperville  
400 S. Eagle Street  
Naperville, Illinois 60540

By: s/Doug E. Ibendahl

Doug E. Ibendahl, ARDC No.: 6229474  
165 N. Canal Street, Suite 1215  
Chicago, Illinois 60606-1404  
Tel: 312-648-0061  
Email: [dibendahl@mail.com](mailto:dibendahl@mail.com)  
ATTORNEY FOR PLAINTIFF